NO. 41970-0-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT, CROSS-APPELLANT

v.

ODIES WALKER, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Judge Bryan Chushcoff

No. 09-1-02784-8

Reply Brief of Respondent/Cross-Appellant

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Whether the State's claim on cross-appeal is ripe such that this court should consider it?

2. Whether the defense arguments fail in their response to the merits of the State's claim on cross-appeal that the jury instruction regarding the aggravating circumstances was error because it improperly required the State to prove that the defendant was a major participant?

B. STATEMENT OF THE CASE.

The State adopts by reference the Statement of the Case from its Brief of Respondent/Cross-Appellant.

C. ARGUMENT.

1. THE STATE'S CLAIM AS TO THE INSTRUCTIONAL ERROR IS RIPE FOR REVIEW.

The defense claims that the State's challenge to the jury instruction on cross-appeal is not ripe for review. Reply Brief of Appellant/Cross-Respondent, p. 18.

The ripeness doctrine aids in determining whether review of an issue is premature. ***State v. Bahl***, 164 Wn.2d 739, 751, 193 P.3d 678 (2008). A claim is fit for judicial determination if: 1) the issues raised are

primarily legal; 2) do not require further factual development; and 3) the challenged action is final. ***Bahl***, 164 Wn.2d 739, 752, 193 P.3d 678 (2008). "The court must also consider 'the hardship to the parties of withholding court consideration.'" ***Bahl***, 164 Wn.2d at 751 (quoting ***First United Methodist Church v. Hr'g Exam'r***, 129 Wn.2d 238, 255, 916 P.2d 374 (1996)).

Here, the challenged language of the jury instruction is a purely legal issue. No further factual development is required where the instruction was given in the course of a jury trial at the conclusion of the parties' cases, and the jury returned a verdict. The trial court's giving of the jury instruction over the State's objection was also a final decision. Because the State's claim satisfies all three requirements, it is ripe for review.

Further, withholding court consideration also imposes a hardship on the State. In the event the court were to reverse the conviction and the case were again retried to a conviction under the same instruction that the State claims is erroneous, this would require the State to unnecessarily litigate the issue anew via a subsequent appeal, and then to essentially re-try the case for purposes of proving the aggravator alone if it were to win on appeal. Doing so is tremendously wasteful of the State's resources, not to mention principles of judicial economy. Moreover, the State may loose

access to necessary witnesses and memories may fade, materially affecting the State's ability to meet its burden to prove the aggravator under the correct standard.

However, *see*, ***State v. Whitaker***, 133 Wn. App. 199, 235, 135 P.3d 923 (2006) (declining to consider the State's claim on cross-appeal because the court affirmed the conviction and sentence).

It is also necessary for the State to bring its claim on cross-appeal or risk having its challenge barred under the law of the case doctrine. This is because it is a well settled principle of law in Washington that unchallenged jury instructions become the law of the case. ***State v. Ng***, 110 Wn.2d 32, 39, 750 P.2d 632 (1988); *see also* ***State v. Hickman***, 135 Wn.2d 97, 102, 954 P.2d 900 (1998); ***State v. Salas***, 127 Wn.2d 173, 182, 897 P.2d 1246 (1995); ***State v. Dent***, 123 Wn.2d 467, 869 P.2d 392 (1994); ***State v. Hames***, 74 Wn.2d 721, 725, 446 P.2d 344 (1968). However, if the law of the case applies, RAP 2.5(c)(2) may nonetheless limit the application of the doctrine in a way that it ultimately makes the application of the doctrine discretionary on the part of the appellate court. *See* ***State v. Schwab***, 163 Wn.2d 664, 185 P.3d 1151 (2008). The State cannot know in advance how the court will exercise that discretion. That being so, it was necessary for the State to raise the challenge in order to ensure that the State's challenge to the instruction was preserved. Under the defense argument, the State would rarely be able to get review of an error in an instruction on an aggravator. Review is never available

in the event of an acquittal. So the only circumstance where review would be available under the defense theory is if the jury were to find the defendant guilty, but find that the aggravator was not proved. However, limiting review to only such a circumstance is contrary to principles of judicial economy. *See, e.g.*, ***State v. Schwab***, 163 Wn.2d 664, 677, 185 P.3d 1151 (2008) (holding that practical interests of judicial economy supported the Court of Appeals invocation of the limit on the law of the case doctrine under RAP 2.5(c)(2) because it did not make sense to require another remand for resentencing).

The defense claims that the state would suffer no prejudice because, as an aggravating factor, in the event the appellate court were to rule in the State's favor and reverse the trial court, the State could still always re-empanel a jury to consider the aggravating factor alone. Reply Brief of Appellant/Cross Respondent at 19. Aside from the fact that it is contrary to principles of judicial economy, this argument by the defense is mistaken, because the waste of the State's resources is a prejudice, as is justice delayed. Indeed, with the passage of time, witnesses can become unavailable, and memories fade so that the State can also suffer a very real prejudice in its ability to pursue the aggravator.

Because the State's claim satisfies the test for ripeness, the Court should consider it on the merits.

2. THE INSTRUCTION GIVEN WAS ERRONEOUS BECAUSE THE "MAJOR PARTICIPANT" LANGUAGE IS ONLY REQUIRED IN DEATH PENALTY CASES

In order to be sentenced for aggravated first degree murder, a jury must first convict the defendant of premeditated murder in the first degree. ***State v. Kincaid***, 103 Wn.2d 304, 310, 692 P.2d 823 (1985) (citing RCW 10.95.020; RCW 9A.32.030(1)(a)). The jury then must determine whether an aggravating circumstance is present. ***Kincaid***, 103 Wn.2d at 310; RCW 10.95.030. If aggravating circumstances are present, and the death penalty has been sought, in a separate capital sentencing phase the jury must determine whether sufficient mitigating factors exist to merit leniency. ***Kincaid***, 103 Wn.2d at 310; RCW 10.95.070.

A defendant found guilty only of premeditated first degree murder without an aggravator having been found is sentenced to life in prison with the possibility of parole. ***Kincaid***, 103 Wn.2d at 310. A defendant found guilty of premeditated murder in the first degree where one or more aggravating circumstances exist, but the death penalty has not been sought, or there is a finding that leniency is merited receives a sentence of life in prison without parole. ***Kincaid***, 103 Wn.2d at 310; RCW 10.95.070, .080. On the other hand, if the death penalty has been sought, and the jury finds that there are no mitigating circumstances meriting leniency, the defendant shall be sentenced to death. ***Kincaid***, 103 Wn.2d

at 310; RCW 10.95.070, .080. Thus, the Washington Statutes provide three levels of punishment for convictions for premeditated first degree murder. ***Kincaid***, 103 Wn.2d at 311.

a. A Sentence Of Life Without Parole Is Not Akin To A Sentence Of Death.

In ***State v. Roberts***, the court held that where a defendant is convicted solely as an accomplice to premeditated first degree murder, major participation in the acts giving rise to the homicide is required to impose a sentence of death upon the defendant. ***State v. Roberts***, 142 Wn.2d 471, 505, 14 P.3d 713 (2000).

The defense claims that a sentence of life without parole is akin to a sentence of death, and for this reason the "major participant" language should also be constitutionally required where a life sentence is sought. Reply Brief of Appellant/Cross-Respondent, p. 19. However, this claim is without merit.

The defense argument is essentially based on two points: 1) that a sentence of life without parole and a sentence of death are akin because the defendant has no possibility of release after them; and 2) the legislature viewed both sentences to be akin, which is evidenced by the fact that neither sentence can be imposed unless the jury finds aggravating factors. However, upon closer inspection, neither argument has merit.

i. **A sentence of life without parole and a sentence of death are not functionally akin.**

The defense is correct that a defendant has no possibility of release from custody in a sentence without parole and a death sentence. However, that is not the salient issue. Certainly, at one level, as a matter of logic, a death sentence always necessarily includes within it a sentence of life without parole because when a defendant is executed he has served a sentence for the remainder of his life and not been released on parole. However, such a sentence is an artificially foreshortened sentence of life without parole because it also includes a penalty fundamentally different and much greater than life without parole: the penalty of death.

Qualitatively, the penalty of death is completely different from a sentence of life without parole. For the defendant, it ends his life. Additionally, it is also different from a functional perspective insofar as once imposed, a penalty of death is irreversible. It is because of these fundamental differences that a sentence of death receives the protections of heightened scrutiny and heightened concerns of proportionality. In every way, it is fundamentally different and something of its own kind.

> It is true that petitioner's sentence[life without the possibility of parole] is unique in that it is the second most severe known to the law; but life imprisonment with

> possibility of parole is also unique in that it is the third most severe. ... But even where the difference is the greatest [between life without parole and lesser sentences], it cannot be compared to death.

Harmelin v. Michigan, 501 U.S. 957, 996, 111 S. Ct. 2680, 115 L.Ed.2d 836 (1991).

For these reasons, a sentence of death and a sentence of life without parole are not akin and the defendant's argument is without merit.

ii. The Plain Language Of The Statutes Precludes Application Of The "Major Participant" Language To A Sentence Of Life Without Parole.

It was in ***Enmumd v. Florida*** that the United State's Supreme Court first held that accomplice liability to murder is insufficient to support imposition the death penalty, where the defendant who was an accomplice was a minor participant in the crime. ***Enmund v. Florida***, 458 U.S. 782, 102 S. Ct. 3368, 73 L.Ed.2d 1140 (1982).

This is because the "cruel and unusual punishments" Clause of the Eighth Amendment prohibits all punishments which by their excessive length or severity are disproportionate to the crime charged. The court concluded that the purposes of punishment of retribution and deterrence were not served by the imposition of the death penalty for a defendant's minor participation in the crime of robbery by acting as a get away driver. ***Tison v. Arizona***, 481 U.S. 137, 107 S. Ct. 1676 (1987) (citing ***Enmund***,

458 U.S. at 798-99). However, in ***Tison***, the court held that where a defendant's participation in a violent crime is major, rather than minor, it does not violate proportionality that a defendant who is an accomplice received the death penalty.

Here, it is clear from the statutes that the Legislature did not regard life without parole and the death penalty to be akin for purposes of the "major participant" requirement. "It does appear, however, that the Legislature envisioned, at least in some circumstance, that an accomplice might be subject to the death penalty" ***Roberts***, 142 Wn.2d at 502. Indeed, the legislature specifically excluded "major participation" from applying to life without parole when it specified that one of the mitigating factors was "Whether the defendant was an accomplice to a murder committed by another person where the defendant's participation in the murder was relatively minor." *See* ***Roberts***, 142 Wn.2d at 502 (citing RCW 10.95.070(4)). This language is dispositive on this issue. The "major participation" language is improper in the jury instruction where the death penalty is not being sought, because the minor participation of an accomplice is specifically identified as a mitigating factor.

The defense claims that in the statute all the aggravating circumstances refer to some conduct by "the person" [*i.e.*, the defendant]. Reply Brief of Appellant/Cross-Respondent, p. 27 (stating that each aggravating circumstance "...is relevant only to 'the person.'" and quoting RCW 10.95.020). However, a number of the aggravating circumstance in

fact do not refer to "the person." *See* RCW 10.95.020(7), (8), (12). Additionally, the aggravating circumstance in subsection 10 can be committed by either of two alternative means [1) common scheme or plan; or 2) a result of a single act of the person] and only one of those two alternative means is limited to an act by "the person" [defendant]. RCW 10.95.020(10).

Under the rule of *expressio unius est exclusion alterieus*, the expression of one thing in a statute implies the exclusion of another. ***State v. Enquist***, 163 Wn. App. 41, 52 n. 6, 256 P.3d 1277 (2011).

The defense also claims that the reference to "accomplice" liability in some sentence enhancements, but not the aggravating circumstances for premeditated first degree murder, also supports the application of the "major participant" language to a sentence of life without parole. However, that argument also fails for two reasons. First, sentence enhancements are different than aggravators. Moreover, sentence enhancements are codified under the sentence reform act, while the premeditated first degree murder aggravating circumstances have been specifically placed by the Legislature into a separate subsection outside of the sentence reform act.

As the court in ***Kincaid*** noted, it is of particular significance that the fact that the Legislature did not place the aggravated murder statute in RCW Title 9A, but rather as "An Act Relating to capital punishment"

enacted as part of RCW Title 10, which pertains to criminal procedure. ***Kincaid***, 103 Wn.2d at 309.

The defense relies almost exclusively upon sentence enhancement cases to argue that accomplice liability alone is insufficient to support a finding of aggravating circumstance that increases a sentence unless the jury also finds that the defendant personally acted to violate the aggravator. However, sentence enhancement cases are of limited relevance. First, "[s]entencing enhancements increase the presumptive or standard sentencing range, but they do not require a finding of an aggravating factor that allows the trial court to consider imposing an exceptional sentence outside the presumptive or standard sentencing range." ***State v. Rice***, 159 Wn. App. 545, 569, 246 P.3d 243 (2011). Second, sentence enhancements fall under the SRA, but the aggravators for premeditated first degree murder do not. Third and most importantly, it is the statutory language of the enhancement, in conjunction with the complicity statute that control whether or not the defendant needs to also personally violate the enhancement. However, for the reasons explained above, the statutory language of the aggravators does not require that the defendant personally engage in the aggravating conduct.

iii. Reference To California Defendant's Dying Prior To The Imposition Of The Death Penalty Is Irrelevant.

The defense also presents a flawed argument when it uses California statistics to argue that most death row inmates die of natural causes so that a sentence of life without parole and a sentence of death are the equivalent.

In Washington, since 1904, 78 persons have been executed. *See* http://www.doc.wa.gov/offenderinfo/capitalpunishment/executedlist.asp Currently, seven persons have received a sentence of death that has not yet been imposed. *See* http://www.doc.wa.gov/offenderinfo/capitalpunishment/sentencedlist.asp. The State is unaware of any statistics from Washington regarding the number of persons who died of natural causes before the death penalty was imposed. However, any such numbers would be essentially meaningless for purposes of this analysis.

A sentence of life without parole is the only sentence that runs for the term of the defendant's life. Thus, whether a defendant has received a determinate sentence or a sentence of death, the terms of the sentence will not be completed any time the defendant dies while in custody. Because a sentence of death involves many procedural safeguards for the defendant,

a defendant will often be incarcerated for a long period of time, often going on for decades, before the sentence of death is ultimately imposed. For this reason, it is likely that a proportionately higher number of defendants sentenced to death will die before their sentence is imposed. Other factors such as the age of the defendant at the time sentence was imposed, as well as procedural mechanisms that permit further review, will also affect the number of defendants who die before the sentence is complete.

Of course, it is necessarily a logical impossibility for a defendant to die before having served a sentence of life without parole. The fact that defendants who die before the death penalty is imposed have the functional equivalent to a sentence of life without parole means nothing in itself, and is rather an accident of logical necessity. That accident does not mean that the two sentences, life without parole and death, are the same or comparable.

b. The Defendant's Argument That The Washington Constitution's Greater Protection Against Cruel And Unusual Punishment Requires The "Major Participant" Language Also Fails.

The defense then further argues that this Court should hold that the Washington Constitution provides greater protection than the United States Constitution. Reply Brief of Appellant/Cross-Respondent, p. 22

(citing ***Roberts***, 142 Wn.2d 471, 506). With little more than this bare assertion, the defense claims that based on the greater protection under Article I, section 14 of the Washington constitution, the court should require that the "major participant" language applies to the sentence of life without parole.

However, in this context, the greater protection afforded by Art. I, § 14 consists of applying an objective standard to a proportionality analysis in order to "...minimize the possibility that the merely personal preferences of judges will decide the outcome of each case." ***State v. Manussier***, 129 Wn.2d 652, 9921 P.2d 473 (1996). Under this objective test, in determining whether a punishment is disproportionate to the crime and thus "cruel" contrary to the requirements of Const. art. I, §14, the court considers three factors: 1) the nature of the offense; 2) the punishment the defendant would have received in other jurisdictions for the same offense; and 3) the punishment imposed for other offenses in the same jurisdiction. ***Manussier***, 129 Wn.2d at 652.

None of those factors weigh against a sentence of life without parole for premeditated murder in the first degree committed by way of accomplice liability. This is because in Washington, a defendant is only guilty as an accomplice by way of having knowledge of the specific crime

charged as opposed to assisting in any crime. ***State v. Carter***, 154 Wn.2d 71, 76, 109 P.3d 823 (2005).

D. CONCLUSION.

For the foregoing reasons, the defense arguments as to the jury instruction on the aggravators is without merit so that the State's claim on cross-appeal should be granted.

DATED: July 19, 2012.

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